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IN THE

Supreme Court of the United States

October Term 1968

No. 506

DR. ALLEN DAHL; LYLE EINHAUS; DR. FRANK J. RIGOS; KENNETH ROGSTAD; DR. RICHARD CLARK; DENNIS G. HAGEN; SELMER THORP; and DR. CHARLES R. WOLFE,
Appellants,

v.

THE REPUBLICAN STATE COMMITTEE, and C. MONTGOMERY JOHNSON, Chairman,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

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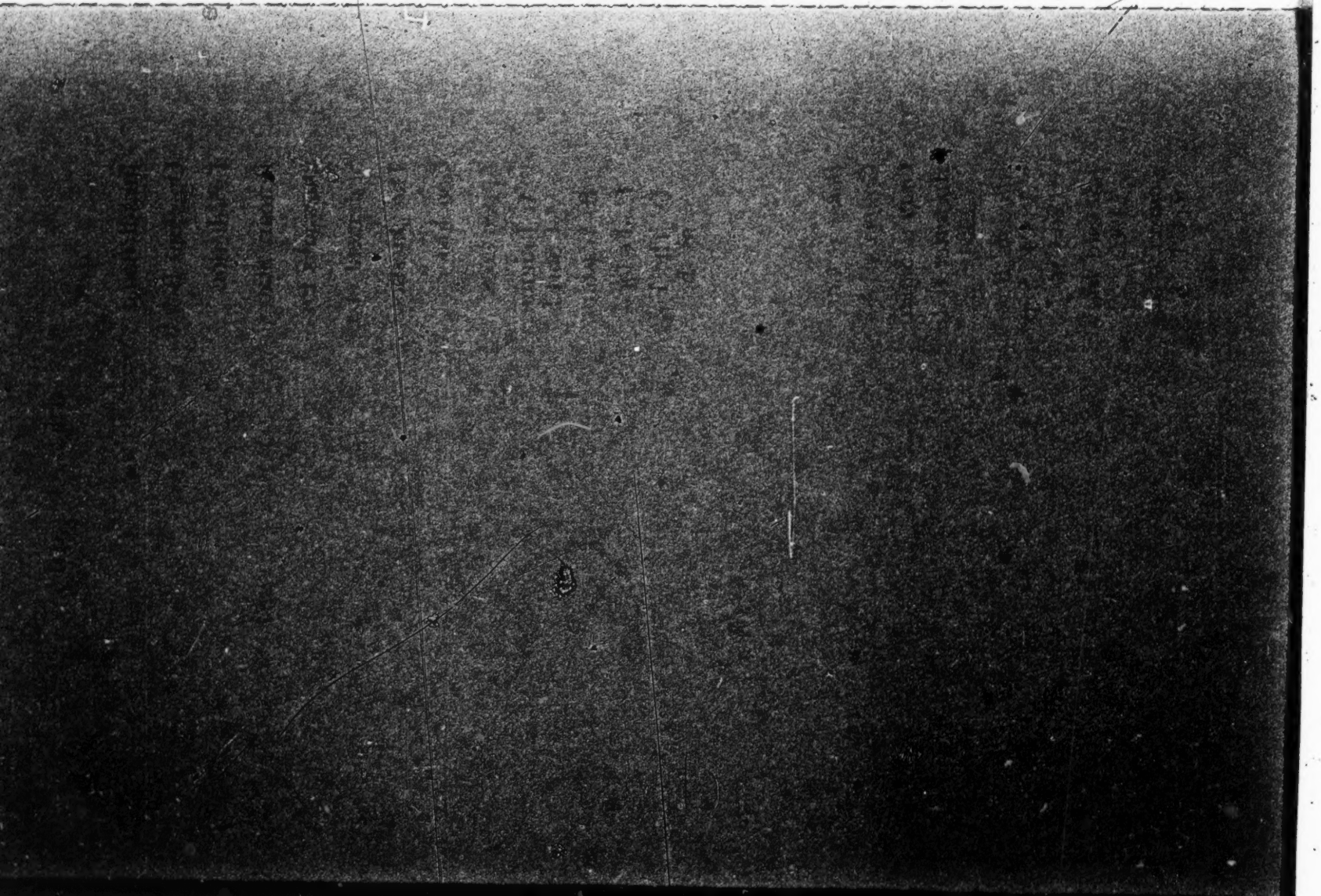

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Opinions Below	1
Jurisdiction	2
Primary Statutes and Constitutional Provisions Involved	2
Questions Presented	3
Statement of the Case	4
The Questions Are Substantial	6
Conclusion	13
Appendices:	
A. Judgment and Memorandum Orders of the Court Below	A-1
B. Washington State Statutes	A-9
C. Federal Statutes	A-10
D. The Fourteenth Amendment to the Constitution of the United States, Section 1	A-13

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U. S. 186 (1962) 2, 10

Cooper v. Aaron, 358 U. S. 1 (1958) 11

Gray v. Sanders, 372 U. S. 368 (1963) 2, 4, 7, 9, 10

Hostetter v. Idlewild Liquor Corp., 377 U. S. 324 (1964) 12

Idlewild-Bon Voyage Liquor Corp. v. Rowan, 188 F. Supp. 434 (S.D.N. 4, 1960), 289 F.2d 426 (2d Cir. 1961), 194 F. Supp. 3 (S.D.N. 4, 1961) 12

Idlewild Liquor Corp. v. Epstein, 370 U. S. 713 (1962), 212 F. Supp. 376 (S.D.N. 4, 1962) 12

Louisville & Nashville R. R. v. Mottley, 211 U. S. 149 (1908) 12

Page

Newberry et al. v. United States, 256 U. S. 232..... 11
Phillips v. United States, 312 U. S. 246 (1941)..... 11
Reynolds v. Sims, 377 U. S. 533 (1964)..... 2
Smith v. Allright, 321 U. S. 649 (1944)..... 9
Stratton v. St. Louis, S.W. Ry., 282 U. S. 10 (1930)..... 12
Terry v. Adams, 345 U. S. 461 (1953)..... 9
United States v. Classic, 313 U. S. 299 (1941)..... 9

Constitutional Provisions

United States Constitution, Amendment XIV, Sec. 1....2, 3

Federal Statutes

28 U.S.C. Sec. 1253..... 2
28 U.S.C. Sec. 1343(3)..... 2
28 U.S.C. Sec. 2201..... 2
28 U.S.C. Sec. 2281.....2, 11
42 U.S.C. Sec. 1983..... 2

State Statutes

Washington Laws 1925, Ex. Sess., ch. 158..... 4
Washington Laws 1965, c. 9, Secs. 29.42.010-.020.....2, 9

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THE REPUBLICAN STATE COMMITTEE, and C. MONTGOMERY JOHNSON, Chairman,
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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

This appeal is taken by Dr. Allen Dahl, *et al.*, from a judgment and decree of dismissal entered on July 15, 1968 in accordance with the Memorandum Orders, dated April 12, 1968 and June 4, 1968, of the District Court of the United States for the Western District of Washington, sitting as a three-judge statutory court specially invoked by virtue of the provisions of 28 U.S.C. Sec. 2281. This statement is submitted by appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The judgment and decree of dismissal dated July 15,

1968 and the Memorandum Orders dated April 12, 1968 and June 4, 1968 are unreported and are attached hereto as Appendix A.

JURISDICTION

This action was brought under 28 U.S.C. Secs. 1343(3), 2201, and 2281 and 42 U.S.C. Sec. 1983, seeking a declaratory judgment and injunctive and other appropriate relief to restrain as unconstitutional the enforcement, operation or execution of state statutes and to redress the deprivation under color of state law, statute, regulation, custom and usage, of federal constitutional rights. The judgment of the District Court was entered on July 15, 1968 and notice of appeal was filed in that court on August 2, 1968. The jurisdiction of this court to review the decision by direct appeal is conferred by 28 U.S.C. Sec. 1253. The following decisions sustain such jurisdiction in this case: *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Reynolds v. Sims*, 377 U.S. 533, (1964).

PRIMARY STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Sections 29.42.010 and 29.42.020 of Chapter 9 of the Laws of 1965 of the State of Washington are set forth in Appendix B (A-9, *infra*).

28 U.S.C. Secs. 1343(3), 2201, and 2281, and 42 U.S.C. Sec. 1983, are set forth in Appendix C (A-10-12, *infra*).

The Fourteenth Amendment to the Constitution of the United States, Section 1, is set forth in Appendix D (A-13, *infra*).

QUESTIONS PRESENTED

1. Whether the Washington statutes challenged herein (A-9, *infra*) unconstitutionally and unlawfully deny appellants, and the classes of citizens and voters they represent, the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States in that said state statutes require the organization of the state committee of each major political party in the state of Washington on the sole basis of equal representation *of counties* of unequal population, rather than on the basis of equal representation of voters.

2. Whether the "one man-one vote" principle of *Gray v. Sanders*, 372 U.S. 368 (1963), applies to the statewide bodies (Republican and Democratic State Committees) created by the state legislature and authorized to call political party conventions for the purposes of electing delegates to national party conventions, of nominating presidential electors, and of filling vacancies on the party's ticket presented to the voters at general elections.

3. Whether the three-judge statutory court invoked herein should have decided this case on its merits and not have dismissed appellants' action for failure to state a claim upon which relief can be granted.

4. Whether the three-judge statutory court invoked herein abused its discretion in this case in denying appellants' motions for preliminary injunctions.

STATEMENT OF THE CASE

This case presents the very question reserved by this court in *Gray v. Sanders*, 372 U.S. 368, 378, fn. 10, when it stated:

> "10. We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system."

Appellants, as Republican County Chairman and Precinct Committeemen from each of the four most populous urban counties of the State of Washington, brought this class action on behalf of themselves and their respective Republican County Committees and as representatives of the rank and file electors and registered voters in their counties, against appellees Republican State Committee and its chairman to restrain the enforcement, operation or execution of certain state statutes (A-9, *infra*) which vest control of the Republican state organization in appellees in a manner to effectively deprive appellants of their right to have their vote be equally represented in the state elective process.[1] The manner of deprivation is as follows: Of the thirty-nine (39) counties of the state of Washington, the four most populous urban counties contain 60.5% of the state population and 62.3% of the voters casting Republican ballots in the 1964 Presidential election; yet these four counties are entitled under state law to only 10.3% of the representation on appellee committee by virtue of the statute's granting each county two (2) votes, regardless of population. Thus, the voters of the four populous urban counties are placed in a per-

1. It should be noted that the statutes attacked by appellants were enacted in substantially their present form in 1925, and have never been changed in light of the "one man-one vote" rulings by this Court. Laws, State of Washington Ex. Sess. 1925, ch. 158.

petual minority voting status on all questions concerning the exercise of the statutory powers of major political party organizations, including the power to call conventions for the election of delegates to state and national nominating conventions, the power to fill vacancies on the party ticket presented to the voters at general elections, and the power to nominate presidential electors. The effect of this statutory deprivation of equal representative voting power is to deny to the electors and voters of the four populous urban counties the exercise of their full franchise in an integral part of the state and federal elective process, namely the nomination of candidates for public office, including the offices of President and Vice-President of the United States.

Appellants specifically requested that the statutes be declared unconstitutional and sought appropriate injunctive relief.

The three-judge District Court in an order printed as Appendix A dismissed the action for failure to state a claim upon which relief can be granted, with leave to amend the complaint. In so doing the court held that the statutes creating the state committee on a county unit basis were not unconstitutional and therefore there was no jurisdiction for a three-judge court. It expressly refused to pass on the question of whether the so-called "one man-one vote" principle is applicable to state nominating conventions.

Appellants then filed an amended complaint in two counts. Count I reiterated appellant's attack on the state statutes, seeking that they be declared unconstitutional, that Appellees be restrained from taking any action pursuant to said statutes and from organizing the Republican

State Committee on any basis other than one giving equal representation to the electors and voters of the state, and that Appellee Committee be dissolved and its promulgated rules and regulations be declared null and void.

In Count II, appellants sought a declaratory judgment that the formula adopted by Appellees for the allocation of delegates to the Republican State Convention, held on June 21-22, 1968, was unconstitutional and that Appellees be restrained from proceeding to organize and hold a Republican State Convention wherein allocation of delegates thereto was other than based on a formula representative of the citizens or Republicans to be represented at the Convention. The District Court struck the amended complaint for lack of jurisdiction of a three-judge court, again with leave to amend the complaint.

At page 2 of the Memorandum Order (A-5, *infra*) the three judges stated their purpose in dismissing as follows:

> *"In so doing, it was the court's intention to furnish plaintiffs a clean-cut ruling against their contention that the state statute is unconstitutional, which plaintiffs could appeal to the Supreme Court if they so elected."* (Emphasis added.)

Appellants did not amend a second time and the decree of dismissal was entered, from which this appeal is taken.

THE QUESTIONS ARE SUBSTANTIAL

Appellants attack the constitutionality of Washington statutes (A-9, *infra*) which *require* the organization of major political parties on a county-unit basis. The state committees so organized are delegated by statute certain broad powers including the power to determine and allo-

cate delegates and representatives to party conventions, both state and national, at which the party's candidates for president and vice-president of the United States are nominated.

The statutory imposition of the county-unit basis for representation results in a disparity of representation within the state committee whereby one voter of San Juan County has the voting strength of approximately 366 voters of King County. Similar distortions exist throughout Washington whereby counties having 20 or less voting precincts nevertheless have the same voice as King County with over 2200 voting precincts. The result of permanently relegating the populous counties to a minority voice in the statutory state committee is to permanently establish minority control over those aspects of the election process assigned by statute to the political parties.

Because the control of the election process delegated to the appellee Republican State Committee is vested in a body created without regard to equality of representation (either voter or population), the exercise by the body of such control cannot and does not reflect the will of the majority of the voters, electors, or population, and is therefore in violation of the letter and spirit of the "one man-one vote" principle of *Gray v. Sanders*, 372 U.S. 368 (1963).

Appellants' challenge to the constitutionality of the state statutes creating and empowering the Republican State Committee is not an intra-party problem,[2] nor is it nec-

2. The Democratic Central Committees of several major counties sought leave to intervene in the instant action as parties plaintiff and were allowed to file *Amicus* briefs.

essarily of concern only within the state of Washington. Rather the challenge is to *state action* which delegates a portion of the state's election power to an unrepresentative body which in turn selects those persons who, as convention delegates and in the absence of any type of a state primary election, represent the voters of this state in the selection of nominees for the offices of president and vice president of the United States.

A central issue presented by appellants to this court is whether a state can delegate to an unrepresentative body the power to legislate by resolution or otherwise within the state and Federal election process.

Appellants' rights asserted here can only be protected by attacking the underlying statutes creating the state committee and not by merely attacking the delegate formula promulgated by that committee in respect to a particular convention. It is the state committee which by law governs and controls the convention and could, if it desired, change its formula for selecting delegates at any time up to and at the convention. Pursuant to RCW 29.42.010 it could even choose delegates to a national convention *directly* without holding a convention for that purpose.

To imply, as the District Court did, that the composition of the state committee need not be on the basis of "one man-one vote" as long as the formula for selecting delegates to the state conventions is on that basis is analogous to a ruling that a state legislature need not be apportioned on the basis of "one man-one vote" so long as on all roll calls, for example, the votes of individual legislators were

somehow weighted to reflect population. Such a solution would fail totally to strike at the heart of the problem just as an attack solely on the formula for delegate representation would fail to get to the real issue here.

This question is of great significance to each voter in the state of Washington. It should be of interest to all the voters in the United States since to find that the state of Washington can legislatively create such a body and endow it with the powers of acting *for* the state without the responsibility of being a fair and representative body merely creates the means by which any state can circumvent and otherwise avoid the constitutional principles heretofore held applicable to primary elections, *Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allright,* 321 U.S. 649 (1944); *United States v. Classic,* 313 U.S. 299 (1941), through the instrument of a state convention in lieu of a primary election. See *Gray v. Sanders,* 372 U.S. at 378, fn. 10.

If the "one man-one vote" principle can be so readily avoided by the device of a state-wide nominating convention, then any state for any purpose can avoid the constitutional mandate enunciated by this Court. If the county-unit is a satisfactory basis, there can be others; the ingenuity required is not great once the path has been indicated. There is no reason to believe that the discrimination permitted to exist in the state of Washington where the issue is one of equal representation between sparsely populated rural counties and heavily populated urban counties cannot be duplicated elsewhere, although the character and nature of the discrimination may vary according to the time, place and the disposition of the legislature establishing the system.

Because the District Court below dismissed Appellants' action for failure to state a claim upon which relief can be granted, this Court is presented with an opportunity to reassert its statement in *Baker v. Carr*, 369 U.S. at 199, to the effect that such dismissals are not justified unless the asserted federal constitutional claim is deemed unsubstantial and frivolous. The District Court below did not so deem Appellants' claim and dismissed their action on the ground that Appellants had not challenged the statutes establishing Appellee Committee, but rather the manner in which Appellee Committee had exercised the power delegated to it by the State Legislature, a matter the three-judge statutory court found to be outside its jurisdiction. Appellants submit to this Court that their claim may be novel but it is the very question reserved in *Gray v. Sanders*, 372 U.S. at 378, fn. 10.

Like *Gray v. Sanders*, this is a voting case. The election in question is the presidential election. In Washington state the presidential election is in fact a state-wide election for presidential electors who are elected by majority vote of the people and cast their nine votes as a slate for the presidential and vice presidential candidates nominated by their political party at its national convention, RCW 29.42.020. The geographical unit for which the electors are chosen is the entire state of Washington. See *Gray v. Sanders*, 372 U.S. at 379-380. Thus the presidential election in the state of Washington must be on the basis of one man-one vote. Once that is clear it follows automatically that "The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to *all* phases of state elections," including the crucial phase at which the candidates are nominated. *Gray v. Sanders*,

372 U.S. at 380. The only times when Washington voters have a voice in the election of the president of the United States are (1) election day when they elect presidential electors and (2) when, if they choose, they participate in the election of delegates to the state convention and the national nominating convention. As this court has recognized, "as a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry et al. v. United States,* concurring opinion, 256 U.S. 232 at 286.

In the language of *Phillips v. United States,* 312 U.S. 246, 251 (1941), Appellants' claim seeks

> to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an administrative board or commission.

Appellees' enforcement, operation and execution of these state statutes represent the actions of a legislatively-delegated committee in the interest of the state as a whole; that is, in the enforcement of a state-wide policy through a statute of statewide application. When the result of this state-wide policy is the denial of equal voting rights, then in the words of *Cooper v. Aaron,* 358 U.S. 1, 17 (1958),

> . . . the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action . . . or whatever the guise in which it is taken . . .

Appellants' action against Appellee Committee and its Chairman is within the jurisdiction of the three-judge statutory court specially invoked herein by virtue of 28 U.S.C. Sec. 2281.

Because the District Court below chose not to decide this case on its merits, but rather to dismiss for failure to state a claim upon which relief can be granted, it did not grant the injunctive and other appropriate relief requested by Appellants. The result of this denial was to prevent Appellants and the citizens and voters they represent from effectively participating in the Republican State Convention held on June 21-22, 1968. The District Court need not have denied the relief requested. As a practical matter, the three-judge court could have decided the case on its merits. If on appeal this Court then chose to hold that the three-judge court had been mistakenly convened, the decision of the three-judge court nonetheless would have been jurisdictionally valid. On the other hand, should this Court now hold that the three-judge court should have reached the merits of the case and reverse the District Court's dismissal, then the entire case will have to be heard *de novo* by a properly constituted three-judge court. This extended delay and duplication of judicial effort has more greatly harmed and will further more greatly harm Appellants in the denial of their right to participate equally in the elective process of this state than had the three-judge court proceeded to hear the merits of the case.

Cf. *Stratton v. St. Louis, S.W. Ry.*, 282 U.S. 10 (1930), *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), and the procedural chaos caused by this problem in *Idlewild-Bon Voyage Liquor Corp. v. Rowan*, 188 F. Supp. 434 (S.D.N.Y. 1960), 289 F.2d 426 (2d Cir. 1961), 194 F. Supp. 3 (S.D.N.Y. 1961); *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), 212 F. Supp. 376 (S.D.N.Y. 1962); aff'd as *Hostetter v. Idlewild Liquor Corp.*, 377

U.S. 324 (1964). Such refusal by the District Court to hear the merits of this case is an abuse of discretion within the jurisdiction of this Court to correct.

CONCLUSION

It is respectfully urged that this Court has jurisdiction of this Appeal and should reverse the judgment of the District Court denying Appellants their federal constitutional right to participate and be represented equally in the state elective process. It is submitted that the questions presented by this Appeal are substantial and of great public importance.

Respectfully submitted,

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